IN THE HIGH COURT OF JUDICATURE AT BOMBAY

INTESTAMENTARY AND INTESTATE JURISDICTION

APPEAL NO.914 OF 2002
IN
PETITION NO.862 OF 1998

In the matter of petition for Probate of the last Will and Testament of Bhavanji Umershi Shah, Hindu, Inhabitant of Bombay, Occupation : Retired Businessman at the time of his death resided at 69, Jeevan Kunj, L.J. Road, Mahim, Bombay-400 016.

Rajesh Ratilal Shah ....Appellant
Ori.Petitioner

V/s.

Dhirajlal Bhavanji Shah & Anr. ....Respondents

Mr.P.K. Samdani, Senior Counsel i/b Mr.R.C. Kaushik for the Appellant.

Mr.Ratilal Shah Respondent No.2 present in person.

CORAM : DR.S. RADHAKRISHNAN &
S.J. VAZIFDAR, JJ.
DATED : 25TH JULY, 2006.

P.C. :

1. This is an Appeal against the order of the learned single Judge dismissing the Petition for Probate on the ground that after the Petition was filed, the parties had executed a release deed setting at naught the wish of the testator of the Will sought

to be probated.

2. Appellant No.1 was transposed as Respondent No.2. Appellant No.1 and Appellant No.2 had filed the above Petition for probate of the last Will and Testament of one Bhavanji Umershi Shah. Citations were served on various parties. Respondent No.1 filed a caveat. Under the Will, the deceased appointed his sons the Appellant and the Respondents as the executors of the Will.

3. The Will contains detailed directions regarding disposition of the assets of the deceased. It is not necessary to set out the same. Suffice it to note that a bequest was made inter-alia in favour of the Appellant. The translation of the Will which is in Gujrati in this regard reads as under :-

> "I give and bequeath Girikunj building to my son Ratilal and his three sons Rajesh, Girish and Dilip. After my death they all four shall be the Owner of Girikunj building".

4. The learned single Judge referred to the judgments in *Ishwardeo Narain Singh v. Kamta Devi, AIR 1954 SC 280* and *Bai Parvatibai v. Raghunath Lakshman,*

42, Bom. L.R. 1063, and noted that there was no quarrel on the principle enunciated therein, namely that the Court of Probate is only concerned with the question as to whether the document put forward as the last Will and Testament of a deceased person was duly executed and attested in accordance with law and that the question whether a particular bequest is good or bad is not within the purview of the Probate Court. It is no part of the duty of the Probate Court to consider the question of title to the property.

5. The learned Judge however, dismissed the Petition on the ground that by virtue of the release deed dated 11.7.1997, the Petition was unfounded. The learned Judge held that by virtue of the release deed, the Will and Testament had been set at naught and grant of probate would be a futile exercise as the release deed had been acted upon.

6. It is important to note that the release deed is executed between one Smt.Laxmiben Bhavanji Shah, widow of the testator, Respondent No.1, one Smt.Zaverben Devchand Shah, widow of Devchand, who was another son of the deceased and one Smt.Sushila Ramakant Darse, daughter of the deceased therein called the Releasors of the one part and Respondent No.2, one

Ramesh Devchand Shah, son of the said Devchand and one Pradeep Devchand Shah, another son of Devchand.

7. There is considerable dispute as to the validity of the release deed. We are not concerned with the same. It is important to note two things about the release deed. Firstly, the Appellant who is a beneficiary under the Will is not a party to the release deed. Mr.Shah, the learned counsel appearing on behalf of the Respondents submitted that he was aware of the same and had acquiescenced in the same.

8. We find it unnecessary to enter into this dispute in a Probate Petition. The effect of the release deed must be agitated in appropriate proceedings. The issue regarding validity and effect of the release deed is not germane to the maintainability of a probate Petition especially when the same is disputed.

9. Secondly, it is important to note that in his affidavit in support of the caveat, Respondent No.1 has himself admitted that they were advised that the parties should obtain probate of the said Will despite the release deed having been executed.

10. In the circumstances, the impugned order is set-aside. The Appeal is allowed. The learned single Judge taking Testamentary and Intestate matters shall decide the Probate Petition. It is clarified that we have not dealt with either the validity or effect of the release deed and the rights and objections of the parties in respect thereof.

(DR.S. RADHAKRISHNAN, J.)

S.J. VAZIFDAR, J.)